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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH, and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Petitioners,

v.

FRED GOLDBERG, JAMES A. BAKER III AND THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONERS' REPLY BRIEF

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Petitioners seek review of a ruling by the Federal Circuit which divests more than one million federal workers who are covered by collective bargaining agreements of their express and unconditional statutory rights to enforce the Fair Labor Standards Act (FLSA) through civil actions brought in district court. *See* 29 U.S.C. 216(b). This unfettered access to a judicial remedy has been an essential element of FLSA enforcement for over fifty years, without regard to any collective bargaining arrangements. But the lower court's decision creates a different rule for federal employees who are covered by collective bargaining agreements. That decision—in di-

rect contravention of the principles this Court set forth in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981)—abolishes those express statutory rights for all such federal employees, union member and non-member alike, substituting for them negotiated grievance-arbitration procedures.

The government does not deny our contentions (Pet. 7-12) that the lower court's decision will have a profound impact upon enforcement of the FLSA in the federal sector. Significantly, the individual employee has no power to invoke arbitration; that power belongs exclusively to the union. Further, no judicial review of the grievance-arbitration procedure is available, and the government has consistently contended (*see* Opp. Cert. 6) that arbitrators cannot afford injured employees full relief, including an award of liquidated damages. Moreover, collective bargaining agreements routinely require employees to invoke the grievance procedure within a few days or weeks of the date that the grievance arose, while the statute of limitations for filing civil actions under the FLSA is at least two years, and can be three years. *See* Pet. 11.

The government nonetheless resists review, contending that *Barrentine* is irrelevant because it arose in the private sector and, further, that the Civil Service Reform Act of 1978 compelled the Federal Circuit's ruling. These meritless contentions provide no justification for denying review of the important questions this case presents.

1. In *Barrentine v. Arkansas-Best Freight System, Inc.*, this Court held that the rights of individual employees to obtain judicial enforcement of their FLSA claims in district court, including liquidated damages, are substantive and non-waivable. 450 U.S. at 740. It specifically observed that FLSA rights "devolve upon [employees] as individual workers, not as members of a collective organization." *Id.* at 745. Congress gave in-

dividual employees the right to sue for back pay, liquidated damages, and attorney fees "to encourage employees to enforce their FLSA rights in court, and thus to further the public policies underlying the FLSA." *Id.* at 740, n.16. Relegating individual FLSA claims to the arbitral forum, which is controlled exclusively by the union, undermines this enforcement scheme. *Id.* at 742; *see also* Brief for the United States as *Amicus Curiae*, Barrentine v. Arkansas-Best Freight System, Inc., No. 79-2006 (Sup. Ct.) at 1 ("[a]ny restriction on the ability of affected employees fully to pursue their statutory rights . . . has a significant negative impact on the enforcement of the Act").

In opposing review here, the government cannot reconcile the lower court's decision with *Barrentine*, nor does it attempt to do so. It can only contend—unpersuasively, at best—that this Court should ignore *Barrentine* simply because that case arose in the private sector and petitioners are federal employees. *See* Opp. Cert. at 4. *Barrentine*, however, may not be casually disregarded on the grounds that it is " 'private sector law'." (*see id.*, quoting Pet. App. 11a). Congress extended full FLSA rights to individual federal employees in 1974—including the right to prosecute violations of that Act in district court. 29 U.S.C. 204(f); 216(b). *Barrentine*, therefore, represents this Court's construction of a law—the FLSA—that is fully and explicitly applicable in the federal sector.[1]

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[1] *Karahalios v. National Federation of Federal Employees*, 109 S. Ct. 1282 (1989) does not support the government's argument that *Barrentine* may be disregarded because it arose in the private sector. *See* Opp. Cert. at 4, citing *Karahalios*. In *Karahalios*, the Court rejected a federal employee's reliance upon judicial interpretations of the National Labor Relations Act (NLRA), to support his claim that he enjoyed an implied right of action to enforce the duty of fair representation set forth in the Civil Service Reform Act. *See id.* at 1287-88. The difference between *Karahalios* and this case is obvious; the NLRA does not govern federal sector labor rela-

In fact, *Barrentine*'s recognition of the pivotal role played by an individual worker's unconditional right to judicial enforcement—including liquidated damages—has even greater importance in the federal sector. As we have explained, the Secretary of Labor, who routinely brings FLSA suits for private sector workers, is not empowered to sue on behalf of injured federal employees. *See* Pet. 8-9. The individual employee's right to sue is thus far more important in the federal sector. The government's conclusory rejection of *Barrentine*'s applicability to this case is, therefore, utterly baseless.

2. Having no substantive response to *Barrentine*, the government relies solely upon the "exclusive procedures" language of 5 U.S.C. 7121(a)(1). That provision, however, does not affect in any way the crucial right the FLSA grants individual federal employees to prosecute their claims in court. In our opening brief (at 16-19) we explained in detail section 7121's legislative history, as well as its evolution from the Executive Order scheme that preceded the Civil Service Reform Act (CSRA). We demonstrated that the language, structure, and history of section 7121 (including specific references to the exclusivity provision in the Conference Committee Report), establish beyond doubt that Congress enacted section 7121 merely to regulate the relationship between the negotiated grievance procedure and the confusing array of pre-CSRA agency appeals procedures. Congress had no intent to disturb the rights of employees to exercise explicit judicial causes of action conferred by other statutes. *See* Pet. 17-19.[2]

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tions, while the FLSA is fully applicable in the federal sector. *Karahalios* did not authorize the lower court to disregard decisions by this Court interpreting a statute—the FLSA—which by its terms applies to both private and federal sector employees.

[2] The very term used in Section 7121(a)(1)—"exclusive procedures"—was carried over from Executive Order 11491, as amended. Section 13 of the Order provided that the negotiated procedure "shall

The government's opposition offers no rebuttal of our extensive discussion of the evolution and structure of section 7121; it virtually ignores it.[3] At the same time, it identifies *nothing* in any of the Committee reports or lengthy debates surrounding the passage of the CSRA which supports its own sweeping interpretation of the "exclusive procedures" language. Its inability to find *any* support in the legislative history is particularly significant given the fact—which the government does not dispute—that its interpretation could dramatically reduce the availability of a broad range of judicial remedies to individual federal employees who are covered by collective bargaining agreements, union member and nonmember alike. *See* Pet. at 20.

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be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage." *Legislative History of the Federal Service Labor Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. (Comm. Print 1979) (hereinafter "Leg. Hist.") at 1346. There was never any suggestion during the Executive Order regime that this language had any preemptive effect upon judicial rights of action. *See also* Pet. at 18 & n.14 (discussing relationship between Executive Order and subsections (d) and (e) of section 7121).

[3] The government merely asserts (Opp. Cert. 4, n.1) that our argument "finds no support in the text or purpose of the statute," but does not bother to address the discussion of the statute's text and purpose that our petition set forth at length. Its further observation (*id.*) that the matters listed in section 7121(e) are "subject to both administrative and judicial review" is irrelevant. Although the matters covered by section 7121(e) are ultimately subject to judicial review, the actual function of that provision is to preserve employees' rights to file administrative appeals with the Merit Systems Protection Board (MSPB). The further right to judicial review of the MSPB's decisions is granted under a separate statutory provision—section 7703. The government therefore, has not addressed the key point—that subsections (d) and (e) concern the right to choose negotiated procedures or administrative remedies, and not judicial causes of action.

3. The government contends, nonetheless, that Congress must have meant to preclude petitioners from enforcing their FLSA rights in court because the Conference Committee deleted FLSA claims from the list of non-grievable matters set forth in the Senate version of section 7121(c), and because the Committee did not add FLSA disputes to the matters excepted from the exclusivity provision by sections 7121(d) and (e). Opp. Cert. 3-4. This legislative history, however, completely begs the question. While Congress ultimately decided to *permit* employees to use the negotiated procedure to challenge FLSA violations (as provided in the House bill) it takes a considerable leap in logic to conclude that by doing so it also decided to *preclude* employees who could file such grievances from exercising the FLSA civil enforcement rights it had granted them only four years earlier.[4]

Similarly, the Conference Committee's failure to except FLSA enforcement actions from the exclusivity provision by listing such actions in subsection (d) or (e) of section 7121 does not assist the government's position. The "omission," in fact, is entirely consistent with our argument that Congress never intended section 7121(a)(1) to limit union-represented employees' rights to prosecute civil actions; in short, there was no reason for the Committee to take steps to preserve employees' rights to prosecute FLSA enforcement actions because Congress never

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[4] The legislative history actually indicates that the House Committee made FLSA claims grievable at the request of the Comptroller General, who had urged Congress to authorize such grievances because FLSA overtime claims often relate to overtime claims under 5 U.S.C. 5542, which had long been subject to arbitration in the federal sector. *See* Leg. Hist. at 1118; 1126. There is no indication that either the House or the Conference Committee that adopted this portion of the House Bill contemplated that in acceding to the Comptroller General's request it was also depriving employees of civil enforcement rights. The House bill, in fact, contained no exclusivity provision at all.

contemplated that the exclusivity provision would affect such rights.

The government's characterization of this legislative history is, in the end, misleading in the extreme. It asserts that by making FLSA claims grievable, but not explicitly preserving employees' statutory rights to sue, Congress demonstrated that it "knew how to except matters from the exclusivity provision and considered whether to do so in the case of FLSA overtime pay disputes, but chose not to include such disputes in the list of exceptions." Opp. Cert. 4. In fact, all that Congress considered was whether to give employees the option to grieve FLSA violations; nothing in the legislative history supports the government's further claim that Congress also considered whether to include FLSA matters in the "list of exceptions" to the exclusivity provision (contained in sections 7121(d) and (e)), much less that it "chose" not to do so.

4. In our petition (at 13-15), we showed that the Federal Circuit's decision is inconsistent with *United States v. Fausto*, 484 U.S. 439 (1987) and related cases, which hold that implied repeals of "express statutory text" are "strongly disfavored" because it is "strongly presumed that Congress will specifically address language in the statute books that it wishes to change." *Id.* at 453. Because there is no "clear repugnancy" (*id.*) between the FLSA and the CSRA, the lower court's ruling is incorrect. *See* Pet. at 15-19.

The government's various justifications for disregarding these principles (Opp. Cert. 5-6) are meritless. For example, the government claims that there has been no repeal by implication because "the exclusivity provision of section 7121(a) is clear and explicit." Opp. Cert. at 5. Of course, as we have shown, the lower court misinterpreted the exclusivity provision. In any event, however, the court of appeals' decision effects an implied and not express repeal of petitioners' FLSA rights because section 7121(a) does not "specifically address" the right

to judicial enforcement the FLSA affords them. *See Fausto*, 484 U.S. at 453.

Further, it is irrelevant that employees who are not represented by a union still retain their unfettered rights to enforce their FLSA claims in court regardless of agreements reached in collective bargaining. *See* Opp. Cert. 5. Petitioners and one million other federal employees covered by collective bargaining agreements lose that right under the ruling below. Indeed, the ruling below gives a positive preference to employees who are not union-represented, a result surely antithetical to the CSRA. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 107 (1983) (one "major purpose" of the CSRA was to strengthen the position of federal unions and make collective bargaining "a more effective instrument of the public interest"); 5 U.S.C. 7101(a) (finding that "labor organizations and collective bargaining are in the public interest").

Similarly, the fact that petitioners can ask their union to make an effort to resurrect their rights to judicial enforcement through the collective bargaining process (Opp. Cert. 5) does not answer the question posed. It merely means that if the union is inclined to preserve the judicial remedy it must sacrifice the grievance right and make other concessions just to buy that remedy back for employees.

5. Finally, in a futile effort to minimize the importance of the rights the lower court's decision extinguishes, the government suggests (Opp. Cert. 6) that some employees may prefer arbitration to judicial enforcement even at the cost of giving up control of their cases, judicial review, liquidated damages, attorney fees, and perhaps several years of backwages. We think it highly implausible, if not inconceivable, that employees challenging serious FLSA violations (like the class of several hundred employees of the Internal Revenue Service whose rights are at issue here) would choose to exchange these significant rights for the greater "informality" or

"expedition" that arbitration sometimes offers. *See* Opp. Cert. 6. But, in any event, the key point is that the Federal Circuit's decision does not permit individual workers to make a "choice" (*see id.*); it relegates that choice to the collective bargaining process—in direct contravention of *Barrentine*.

Thus, the government's contention (Opp. Cert. 6) that no FLSA right has been lost, and that only a procedure for enforcing the FLSA is at issue in this case, is insubstantial, at best. *Barrentine* establishes that the rights of individual employees to prosecute their FLSA claims in court are *substantive* and non-waivable. Because the government has identified no evidence that when Congress enacted the Civil Service Reform Act it had *any* intent, much less a "clear and manifest" one (*Rodriguez v. United States*, 480 U.S. 522, 524 (1987)), to repeal those important substantive FLSA rights, and because the Federal Circuit's decision seriously undermines vigorous enforcement of the FLSA in the federal workplace, this Court's review is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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